

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2069

To be argued by
MARC MARMARO

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2069

FRED SCHULMAN,
Plaintiff-Appellant,

—v.—

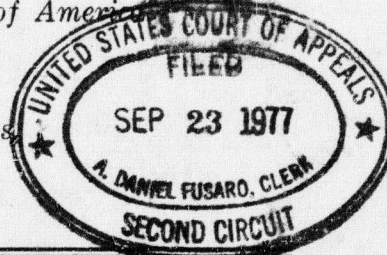
UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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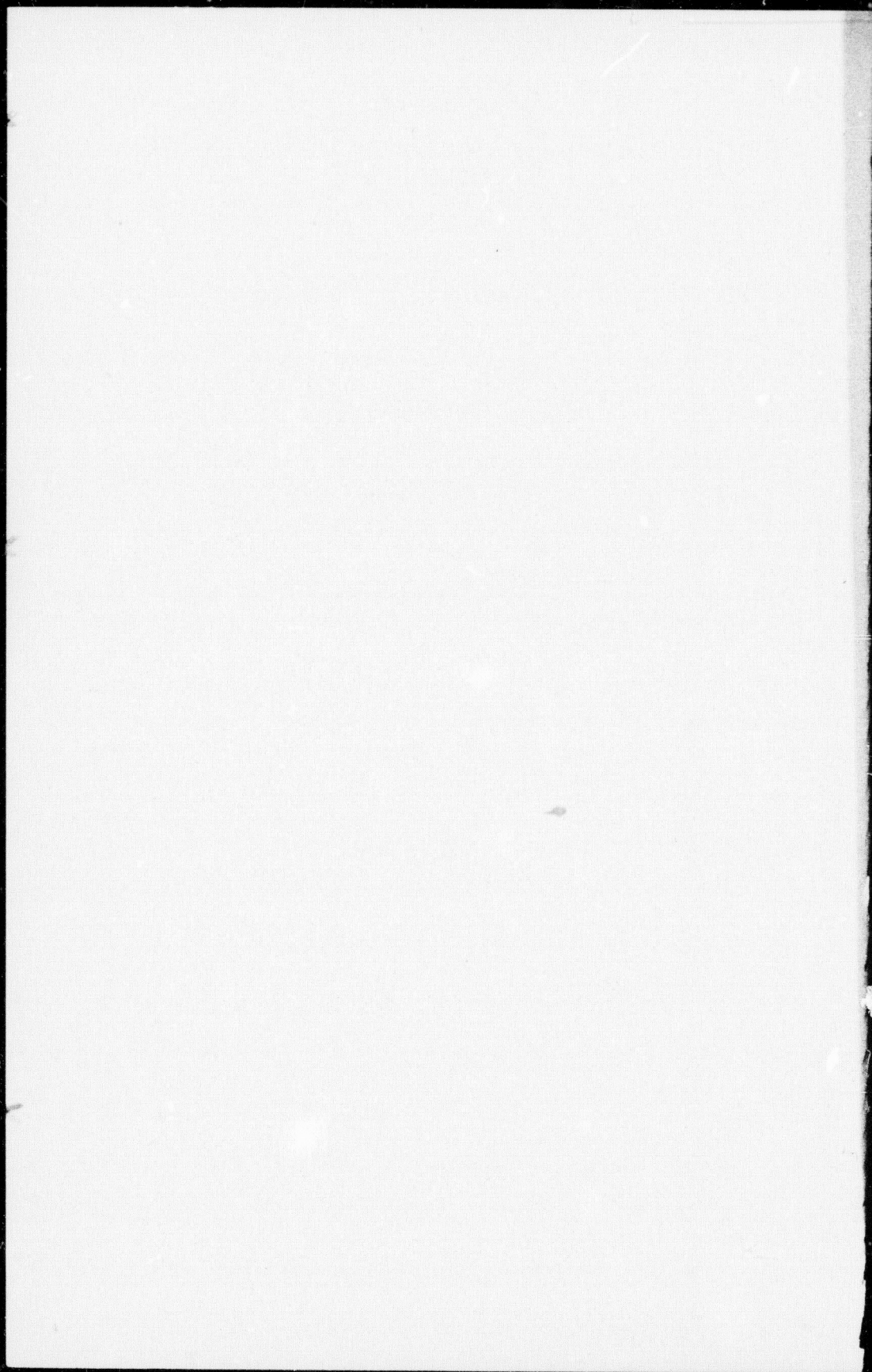


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FRED SCHULMAN,
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—v.—

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Fred Schulman appeals from an order entered on June 15, 1977, in the United States District Court for the Southern District of New York, by the Honorable Whitman Knapp, United States District Judge, denying Schulman's motion pursuant to 28 U.S.C. § 2255 to vacate the judgment of conviction and sentence on Indictment S 75 Cr. 82 entered against him on May 26, 1976.

On May 31, 1974, Indictment 74 Cr. 557 was filed charging Schulman and Raymond Madeo, in two counts, with conspiracy to violate the federal narcotics laws and with distributing, and possessing with the intent to distribute cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), 846 and Title 18, United States Code, Section 2.

On January 24, 1975, superseding Indictment S 75 Cr. 82 was filed charging Schulman and Madeo with the same crimes alleged in Indictment 74 Cr. 557, and in addition charging Madeo with the unlawful possession of a firearm, in violation of Title 18, United States Code, Section 914(c) (2).*

Trial on Indictment S 75 Cr. 82 commenced as to Schulman on February 2, 1976, and concluded on February 5, 1976, when the jury found Schulman guilty on Counts One and Two. On May 26, 1976, Judge Knapp sentenced Schulman on each count to concurrent two and one-half year terms of prison to be followed by a special parole term of three years.

On September 3, 1976, Schulman filed a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure for a reduction of sentence; this motion was denied by Judge Knapp on September 28, 1976.**

On February 4, 1977, Schulman filed a *pro se* motion, dated January 28, 1977, to vacate the sentence imposed by Judge Knapp on May 26, 1976.*** On February 17, 1977, an affidavit was filed on Schulman's behalf by retained counsel. After a hearing before Judge Knapp on March 29, 1977, Schulman's motion was denied on June 15, 1977.

Schulman is presently serving his sentence.

* Madeo entered a guilty plea to Count One of Indictment S 75 Cr. 82 before Judge Knapp on February 10, 1975 and on April 18, 1975, was sentenced by Judge Knapp to a three and one-half year term of imprisonment. An order of nolle prosequi was filed as to Indictment 74 Cr. 557 on January 28, 1977.

** Schulman was represented by retained counsel, Messrs. La Rossa, Shargel & Fischetti, in connection with his Rule 35 application.

*** This motion was treated by the District Court as having been filed pursuant to 28 U.S.C. § 2255.

Statement of Facts

Throughout all stages of the proceedings against him leading to his conviction and sentencing on May 26, 1976, Schulman was represented by James E. Siff, Esq. On July 21, 1976, Indictment 76 Cr. 666 was filed in the United States District Court for the Southern District of New York charging Siff in five counts, with conspiring to violate the federal narcotics laws and with having aided and abetted the distribution of cocaine on four separate occasions in February and March of 1974. (A. 1, 25).^{*} On October 26, 1976, after having agreed to resign from the Bar, Siff pleaded guilty to a misdemeanor charge before Judge Knapp and was sentenced on December 10, 1976, to probation for a period of five years. (A. 2-3).^{**}

Siff testified at length at the hearing held before Judge Knapp on March 29, 1977. During direct examination by Schulman's present counsel, Siff testified that he was unaware that he was the target of a criminal investigation until February 26, 1976, three weeks after the conclusion of the Schulman trial.^{***} Siff did state,

^{*} References to pages of Schulman's separate appendix are abbreviated herein as "A".

^{**} During the period between the indictment and his plea in this district, Siff represented clients in at least three other trials in the Southern District of New York. *United States v. Sorrentino*, 76 Cr. 626 (affirmed on appeal, Dkt. No. 76-1550; order denying a motion for a new trial or a writ of habeas corpus affirmed on appeal, Dkt. No. 77-1130); *United States v. Stone*, 76 Cr. 790 (affirmed on appeal, 553 F.2d 95 (2d Cir. 1977)) and *United States v. Alvarez* affirmed on appeal, Dkt. Nos. 77-1085-94). Both *Stone* and *Sorrentino* unsuccessfully raised issues relating to their representation by Siff that are virtually identical to those made by Schulman.

^{***} Siff stated that he received this knowledge while engaged in discovery in a criminal case pending in the Eastern District

[Footnote continued on following page]

however, that in April 1975 he has suspicions that a conversation of his had been tape recorded, but added that he quickly forgot about the incident and was not reminded of it again until August or September, 1976, during the course of preparing for his trial. (A. 75-81). Moreover, Siff stated that he believed he did not make any incriminating statements during the April 1975 conversation. (A. 83-84).*

Siff testified that he did not inform Schulman that he (Siff) was under investigation until after Schulman had been sentenced. This occurred, Siff said, sometime between mid-June, 1976 and July 21, 1976, when Siff visited Schulman in federal prison. (A. 95-97).

During cross-examination by the Government, Siff testified that he first consulted counsel in connection with his own legal difficulties on July 16, 1976, the date his case was presented to the Grand Jury, and that it was not until after his indictment that he learned he was being prosecuted on a felony charge. (A. 102-04).

On June 15, 1977, Judge Knapp filed a written memorandum denying Schulman's motion. (A. 118-122).

In his opinion, Judge Knapp noted that Siff had represented Schulman "with competence and zeal at all stages of [the] proceedings." (A. 119). Judge Knapp specifically found that: (i) Siff was not aware that he

of New York. At that time Siff learned that Robert Pincus, from whom he had purchased cocaine in 1973 and 1974, was a Government informer and that Pincus had attempted to place a telephone call to Jeffrey Dali, another individual with whom Siff was acquainted. Siff later recalled that he had introduced Pincus to Dali. (A. 75-77).

* In the April 1975 conversation, Pincus unsuccessfully asked Siff to obtain \$3000 worth of cocaine for him. (A. 79-81).

might be in serious legal jeopardy until three weeks after Schulman's trial; (ii) Siff's representation of Schulman was neither consciously nor subconsciously affected by Siff's potential legal problems; (iii) Schulman did not have knowledge of any facts detrimental to Siff so that Siff had "no possible motive" to advise Schulman to refrain from cooperating with the Government, pleading guilty or testifying in his own behalf; (iv) Siff did not act improperly in not advising Schulman of the pendency of the Government's investigation when Siff first learned about it; (v) the sole reason Siff advised Schulman not to appeal his conviction was the lack of possible merit to any appeal; (vi) Siff had ceased using cocaine prior to the time he began representing Schulman; (vii) no member of the United States Attorney's Office ever suspected that there might be a possible conflict of interest between Siff and Schulman, and thus there was never an obligation on the Government's part to advise Schulman of a possible conflict and (viii) there was no evidence that the Government ever intercepted any conversations between Siff and Schulman during the course of its investigation of Siff. (A. 119-122).

ARGUMENT

Schulman Was Not Deprived of the Effective Assistance of Counsel.

Schulman claims that he was denied the effective assistance of counsel solely because the Government failed to disclose to him that his trial counsel, James E. Siff, Esq., was under investigation for a narcotics-related offense during the pendency of Schulman's trial. This claim is utterly frivolous and should be summarily rejected.

Schulman's argument before this Court is based on his speculation that the investigation of Siff created a

potential conflict of interest.* In pressing this argument, Schulman does not allege that Siff's representation of him was in any way ineffective, rather, he claims solely that he was prejudiced by his lack of knowledge of Siff's investigation.**

Since Schulman has failed to allege any facts suggesting that the investigation of Siff resulted in "some specific instance of prejudice, some real conflict of interest," he is not entitled to relief. See *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States v.*

* Schulman articulates the claimed conflict as follows:

"It is common knowledge that persons under investigation for drug crimes often cooperate with the Government, in return for leniency. Thus, it would be less than wise for a person charged with violation of the federal narcotic [sic] laws to retain counsel who might be tempted to curry favor with the Government in return for a tactical advantage in his own case. Under such circumstances, appellant was entitled to the information concerning his attorney so that he could make a knowing and intelligent choice whether to retain new counsel. Appellant had a right to full disclosure of the investigation of his attorney, so that he could make an intelligent choice." Brief at 8.

This assertion, of course, blithely ignores the fact that there is simply not one scrap of evidence tending to show that Siff ever considered co-operating—or even "currying favor"—with the Government.

** Schulman has apparently abandoned the position he took in the District Court that Siff's representation was inadequate. (A. 22.). It is clear from the trial transcript that Siff's conduct of Schulman's defense was far above the standard recently reviewed by this Circuit, see *Rickenbacker v. Warden*, 550 F.2d 62 (2d Cir. 1976), and indeed Judge Knapp explicitly so found. (A. 119). Schulman has also abandoned the contention advanced in his initial motion that he was denied his right to appeal. (A. 22). As is clear from the record, Schulman was well aware of his appellate rights, and even had another attorney review his trial record in a vain attempt to find grounds for a new trial. (A. 106-07).

Mari, 526 F.2d 117, 119 (2d Cir. 1975), *cert. denied*, 429 U.S. 941 (1976); *United States v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States v. Wisniewski*, 478 F.2d 274, 281 (2d Cir. 1973); *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

Judge Knapp, in his careful opinion, expressly noted that Schulman had failed to demonstrate any prejudice whatsoever. Indeed, Judge Knapp specifically found that Siff was unaware that he was in serious jeopardy until three weeks after the Schulman trial, and that his performance at trial was neither consciously nor subconsciously affected by his potential legal difficulties. (A. 120). This factual conclusion by the District Court Judge who presided at both the trial and the hearing * was not "clearly erroneous," and completely negates the possibility that a conflict existed. *United States v. Cirillo*, 554 F.2d 54, 55 (2d Cir. 1977); *United States v. Eucker*, 537 F.2d 718, 719 (2d Cir. 1976), (per curiam), *cert. denied*, 429 U.S. 1044 (1977); *Zovluck v. United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

Finally, Schulman charges that the prosecutor was guilty of misconduct in failing to inform Schulman that his attorney was under investigation. This remarkable proposition, for which Schulman cites no authority, would require the Government, in a case in which a defense attorney is himself the target of an investigation, either to compromise the investigation of the attorney or pro-

* As this Court has noted, when a trial judge hearing a section 2255 motion also presided at the predicate trial he is afforded a greater measure of discretion in assessing the appropriateness of relief. *United States v. Franzese*, 525 F.2d 27, 32 (2d Cir. 1975), *cert. denied sub nom. Potere v. United States*, 424 U.S. 921 (1976).

ceed against his client at the peril of later having the verdict overturned. Nothing could be further from the public interest than the adoption of such a position.

In raising this argument, Schulman is attempting to convert his wholly inadequate Sixth Amendment claim into a Fifth Amendment one. Even assuming, however, governmental error in failing to disclose the fact of Siff's investigation to Schulman, this omission was not material since Judge Knapp found that Siff's performance at trial was not affected by the investigation. See *United States v. Agurs*, 427 U.S. 97, 110 (1976).

Both the record of the trial as well as the hearing before Judge Knapp demonstrate that Schulman received a fair trial. As Judge Knapp stated in his opinion, "Mr. Siff represented the defendant with competence and zeal at all stages of [the] proceedings." (A. 119). No doubt Schulman was disappointed in the outcome of his trial and is now less than satisfied with his attorney's efforts, providing a vivid example of this Court's recent reiteration that "[a] convicted defendant is a dissatisfied client. . . ." *United States v. Joyce*, 542 F.2d 158, 160 (2d Cir. 1976), quoting *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963). Such dissatisfaction, however, does not itself constitute constitutional error.

Schulman's claims, specifically rejected by Judge Knapp after a thorough hearing, are frivolous.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MARC MARMARO, being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 23rd day of September, 1977
he served two copies of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

LEVINE & POZNANSKY
1350 Avenue of the Americas
New York, New York 10019

An deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Marc Marmaro

MARC MARMARO
Assistant United States Attorney

Sworn to before me this

23rd day of September, 1977.

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979